Usaha Damai Sdn Bhd v Setiausaha Kerajaan Selangor

HIGH COURT (KUALA LUMPUR) — ORIGINATING MOTION NO R3-25-56 OF 1996
NIK HASHIM JC
20 MAY 1997

Arbitration *— Arbitrator — Misconduct — Whether there was misconduct on the part of the arbitrator — Whether arbitrator's findings were in accordance with the law and consistent with the findings of fact which were supported by evidence — Whether award should be set aside — Arbitration Act 1952 ss 22 & 24(2)*

Contract *— Building contract — Termination — Target cost plus contract was in fact a lump sum contract — Whether refusal to revise cost of construction and delay in payment constituted reasonable cause by contractor to suspend works — Whether determination of contract lawful — Whether contractor could claim for quantum meruit for work done*

Pursuant to a formal contract ('the contract') with the respondent, the applicant agreed to construct a specified number of low-cost houses and shophouses for a housing project at a cost of RM2,832,000 on the basis of target cost plus. As the respondent's estimate of the cost of construction was below the actual cost of construction, the applicant then wrote to appeal to the respondent to revise upwards the cost of construction but received no response from the respondent. Notwithstanding that, the applicant proceeded with the task of constructing the project. Due to financial hardship, the applicant stopped work. Consequently, the respondent terminated the contract. Pursuant to the contract, the parties referred their dispute to an arbitrator.

The applicant claimed damages for wrongful determination of the contract or alternatively quantum meruit in the sum of RM122,304.04 for the works completed. The arbitrator, however, inter alia, found that the applicant had no reasonable cause to suspend work, that the determination of the contract was lawful and consequently rejected the applicant's claim. The applicant, being dissatisfied with the arbitrator's award, applied to the court to set aside the award on the ground that the arbitrator had misconducted himself in coming to a conclusion that was at total variance with his own findings of fact. It was contended on behalf of the applicant that the wide discrepancy between the applicant's estimate of the cost of construction and that of the respondent, the latter's refusal to revise upwards the cost of the construction and the delay in payment constituted reasonable cause on its part to suspend the works and that the failure of the arbitrator to consider them after having found that the parties intended the contract to be a target cost plus contract, had gone to vitiate the award, which therefore ought to be set aside.

Held, dismissing the application:

(1) The applicant's complaints were unsustainable as all the matters referred to the arbitrator were conclusively decided by him and the award was certain and unambiguous. There was nothing irregular with the award. The learned arbitrator did carefully analyse and meticulously appraise the material and relevant evidence before him (see p 606E); *Mortin v Burge* (1836) 3 ER 1049 followed.

(2) The contract, though labelled as target cost plus, was in fact a lump sum contract for a fixed price (see p 607A).

(3) The conclusions reached by the learned arbitrator were mixed conclusions of fact and law which could not properly be reviewed in an attempt to set aside the award. If the applicant was not confident in the arbitrator's ability to decide on issues of law, it could have requested the arbitrator to find the facts and state the issues of law for the decision of the High Court pursuant to s 22 of the Arbitration Act 1952. Since this had not been done, the applicant could not therefore ask the court to review the same. In the circumstances, there was no misconduct on the part of the learned arbitrator whose findings were in accordance with the law and consistent with the findings of fact which were supported by evidence (see p 607B–D); *Nippon Yusen Kaisha v Acme Shipping Corp* [1972] 1 WLR 74 followed.

Per curiam:

The authorities were clear that an arbitrator's award might be set aside if he had misconducted himself. Misconduct occurred if the arbitrator failed to decide all the matters which were referred to him (see p 606D); *Official Assignee v Chartered Industries of Singapore Ltd* [1978] 2 MLJ 99 followed.

[Bahasa Malaysia summary

Menurut suatu kontrak rasmi ('kontrak tersebut') dengan penentang, pemohon telah bersetuju untuk membina sebilangan rumah-rumah dan rumah-rumah kedai kos rendah yang telah ditentukan untuk suatu projek perumahan pada kos RM2,832,000 atas dasar kos sasaran tambahan. Oleh sebab anggaran penentang tentang kos pembinaan adalah di bawah kos sebenar pembinaan, pemohon telah kemudiannya menulis kepada penentang dan merayu penentang mengkaji semula kenaikan kos-kos pembinaan tetapi tidak menerima apa-apa maklumbalas dari penentang. Meskipun demikian, pemohon telah meneruskan kerja membina projek tersebut. Disebabkan masalah kewangan, pemohon telah memberhentikan kerja. Lantarannya, penentang telah menamatkan kontrak tersebut. Menurut kontrak tersebut, pihak-pihak telah merujuk pertikaian mereka kepada seorang penimbangtara.

Pemohon telah menuntut ganti rugi atas penamatan kontrak tersebut secara salah atau alternatifnya quantum meruit dalam jumlah

RM122,304.04 untuk kerja yang telah diselesaikan. Namun begitu, penimbangtara, antara lain, mendapati bahawa pemohon tidak mempunyai sebab munasabah untuk menggantung kerja, bahawa penamatan kontrak tersebut adalah di sisi undang-undang dan akibatnya menolak tuntutan pemohon. Oleh itu, pemohon, yang tidak berpuas hati dengan keputusan penimbangtara memohon kepada mahkamah untuk mengetepikan keputusan penimbangtara atas alasan bahawa penimbangtara telah salah laku dalam mencapai suatu kesimpulan yang keseluruhannya berlainan dari fakta yang didapatinya sendiri. Adalah dihujahkan bagi pihak pemohon bahawa perbezaan yang besar antara anggaran pemohon tentang kos pembinaan dan yang dianggarkan oleh penentang, keengganan penentang untuk mengkaji semula kenaikan kos pembinaan dan kelewatan dalam pembayaran merupakan sebab munasabah pada pihaknya untuk menggantung kerja-kerja dan bahawa kegagalan penimbangtara untuk mempertimbangkan demikian setelah mendapati bahawa pihak-pihak telah berniat supaya kontrak itu adalah suatu kontrak kos sasaran tambahan, telah menjejaskan keputusan tersebut yang lantarannya haruslah diketepikan.

Diputuskan, menolak permohonan:

(1) Aduan-aduan pemohon tidak dapat disokong kerana kesemua perkara yang telah dirujuk kepada penimbangtara diputuskan oleh beliau secara muktamad dan keputusan tersebut adalah berkepastian dan jelas. Tiada apa-apa yang di luar aturan dengan keputusan tersebut. Penimbangtara yang bijaksana telah menganalisis dengan berhati-hati dan menimbang dengan terperinci akan bahan dan keterangan yang relevan di hadapannya (lihat ms 606E); *Mortin v Burge* (1836) 3 ER 1049 diikut.

(2) Kontrak tersebut, meskipun dilabelkan sebagai kos sasaran tambahan, adalah pada hakikatnya suatu kontrak jumlah keseluruhan untuk harga yang tertentu (lihat ms 607A).

(3) Kesimpulan-kesimpulan yang dicapai oleh penimbangtara yang bijaksana adalah kesimpulan campuran fakta dan undang-undang yang tidak dapat sewajarnya dikaji semula dalam suatu percubaan untuk mengetepikan keputusan tersebut. Jika pemohon tidak yakin dengan kebolehan penimbangtara untuk memutuskan isu undang-undang, ia boleh meminta penimbangtara untuk mendapat fakta-fakta dan menyatakan isu-isu undang-undang untuk keputusan Mahkamah Tinggi menurut s 22 Akta tersebut. Oleh sebab ini telah tidak dilakukan, maka pemohon tidak boleh meminta mahkamah mengkaji semula sedemikian. Dalam hal-hal keadaan tersebut, tiada salah laku pada pihak penimbangtara yang bijaksana yang mana apa yang didapati oleh beliau adalah menurut undang-undang dan selaras dengan apa yang didapati dari segi fakta yang disokong dengan keterangan (lihat ms 607B–D); *Nippon Yusen Kaisha v Acme Shipping Corp* [1972] 1 WLR 74 diikut.

Per curiam:

Autoriti-autoriti adalah jelas bahawa keputusan seorang penimbangtara mungkin boleh diketepikan jika beliau telah berlaku salah. Salah laku berlaku jika penimbangtara telah gagal untuk memutuskan kesemua perkara yang dirujuk kepada beliau (lihat ms 606D); *Official Assignee v Chartered Industries of Singapore Ltd* [1978] 2 MLJ 99 diikut.]

Notes

For cases on arbitration, see 1 *Mallal's Digest* (4th Ed, 1995 Reissue) paras 697–833.

For cases on building contracts, see 3 *Mallal's Digest* (4th Ed, 1994 Reissue) paras 1245–1337.

Cases referred to

Mortin v Burge (1836) 3 ER 1049 (folld)

Nippon Yusen Kaisha v Acme Shipping Corp [1972] 1 WLR 74 (folld)

Official Assignee v Chartered Industries of Singapore Ltd [1978] 2 MLJ 99 (folld)

Sykt Pemborong Pertanian & Perumahan v Federal Land Development Authority [1971] 2 MLJ 210 (refd)

Legislation referred to

Arbitration Act 1952 ss 22, 24(2)

Rules of the High Court 1980 O 69 r 2

N Subramaniyam (*Lee Swee Seng*) for the applicant.

CF Lim (*Azman Davidson & Co*) for the respondent.

Cur Adv Vult

Nik Hashim JC: This is an application by way of an originating motion pursuant to O 69 r 2 of the Rules of the High Court 1980 and s 24(2) of the Arbitration Act 1952 ('the Act') to set aside an award of the learned arbitrator dated 25 May 1995 on the ground of misconduct in that he came to a conclusion that is at total variance with his own findings of fact.

The dispute which led to the arbitration stemmed from a low-cost housing project in Sungei Besar, Sabak Bernam, Selangor at a cost of RM2,832,000. On 24 March 1987, the applicant was appointed as the contractor for the above-mentioned project and the acceptance letter informed the applicant that the offer was by way of target cost plus and the value of the project was RM2,832,000. Subsequently, the applicant and the respondent signed a contract, whereby the applicant agreed to construct and complete 170 units of low-cost terrace houses of a type known as D1/4/3G and 5 units of shophouses of a type known as R2/2/2G-IMP together with the related works at the said cost.

In the course of estimating the cost of completing the construction of the houses under the project, the applicant discovered that the cost of

A construction as estimated by the respondent was below the actual cost of construction. The difference between the applicant's estimate and the respondents' was RM871,065.62. The applicant wrote a letter to the respondent appealing to the respondent to revise upwards the cost of construction but received no response from the respondent. B Notwithstanding that, the applicant proceeded with the task of constructing the project. Meanwhile, the dispute was referred to an arbitrator, pursuant to cl 54 of the contract.

The applicant, due to financial hardship, stopped work. In the event, the respondent terminated the contract.

C The parties referred two issues for the determination by the arbitrator and they are:

(a) that the applicant is seeking from the respondent damages for wrongful determination of the contract or alternatively quantum meruit in the sum of RM122,304.04 in respect of the works completed; and

D (b) that the respondent denies the claim of the applicant and contends that the contract was determined lawfully in accordance with cl 51(a) of the contract. Alternatively, it is the contention of the respondent that the acts of the applicant in stopping the works without reasonable cause amounted to a repudiatory breach of the contract and that the said repudiation was accepted by the respondent.

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It is the submission of En N Subramaniyam for the applicant that the evidence of the wide discrepancy between the applicant's estimate and that of the respondents', the refusal to revise upwards the cost of the construction and the delay in payment were material and relevant and constitute reasonable cause on the part of the applicant to suspend the works and the F failure of the learned arbitrator to consider them after having made a finding of fact that the parties had intended that the contract should be a target cost plus contract, have gone to vitiate the award which therefore ought to be set aside.

Encik CF Lim for the respondent argued that the two issues were G rightly decided by the arbitrator and thus, the applicant's complaints do not come within the province of s 24(2) of the Act. For ease of reference, I now refer to s 24(2) which states:

> Where an arbitrator or umpire has misconducted himself or the proceedings, or an arbitration or award has been improperly procured, the High Court H may set the award aside.

Raja Azlan Shah J (as His Highness then was) in *Sykt Pemborong Pertanian & Perumahan v Federal Land Development Authority* [1971] 2 MLJ 210, explained the word 'misconduct' at p 211F:

> I In the law of arbitration, misconduct is used in its technical sense as denoting irregularity and not moral turpitude. It includes failure to perform the essential duties which are cast on an arbitrator as such, for instance, failure to observe the rules of natural justice, appearance of bias or partiality. It also includes any irregularity of action which is not consonant with the

> general principles of equity and good conscience. These illustrations are not meant to be exhaustive. But failure to analyse and appraise the evidence does not vitiate the award on the ground of misconduct. It is only when the evidence is material, relevant and had gone to affect the award that the award will be vitiated.

Whereas *Russel on the Law of Arbitration* (20th Ed, 1982) at p 422 states the following respecting 'misconduct':

> It is not misconduct on the part of an arbitrator to come to an erroneous decision, whether his error is one of fact or law, and whether or not his findings of fact are supported by evidence. It may, however, be misconduct if there are gross errors in failing to hear or improperly receiving evidence.

What constitutes misconduct is also set out in 2 *Halsbury's Laws* (4th Ed) at p 330 para 622.

The authorities are clear that an award may be set aside if the arbitrator has misconducted himself. Misconduct occurs if the arbitrator fails to decide all the matters which were referred to him (see *Official Assignee v Chartered Industries of Singapore Ltd* [1978] 2 MLJ 99).

In my judgment, the applicant's complaints are unsustainable as all the matters referred to the arbitrator were conclusively decided by him, and the award is certain and unambiguous (*Mortin v Burge* (1836) 3 ER 1049). There is nothing irregular with the award. The learned arbitrator in the present case was George KS Seah, a former Supreme Court judge. In his 12-page award, he did carefully analyse and meticulously appraise the material and relevant evidence before him. He made the following conclusions:

> 13.4 ... on the facts of the case, I have reluctantly come to the conclusion that the claimant had no reasonable cause to suspend works.
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> 13.5 I also hold that cl 51(a) of the conditions of contract has no application as the claimant had abandoned the works after 27 March 1990 (see para 12.2).
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> 14.1 The next question I have to determine is whether the contract had been terminated by the respondent lawfully. Based on my findings in paras 11.2 to 11.10, 12.1 and 12.2, I am satisfied that the determination of the contract was proper and lawful.
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> 15.1 It follows from these findings that on the question of liability, the claim by the claimant against the respondent therefore fails.

Regarding the applicant's complaint that in view of the arbitrator's finding that the parties had intended that the contract should be a target cost plus (para 5.4 of award) which therefore constituted reasonable cause to suspend work, the learned arbitrator found that there was no reasonable cause on this ground when he said at para 13.4 of the award:

> In my view, the proper step for the claimant to take under the circumstances was not to stop works in March 1990 but to continue with the works until completion to the satisfaction of the respondent in accordance with the terms of the contract without prejudice to the right of the claimant to refer the dispute to arbitration.

A It is a clear term of the contract that the cost of the project is RM2,832,000. The contract although labelled as target cost plus is in fact a lump sum contract for a fixed price.

The applicant is dissatisfied with the award but that is not sufficient to set aside the same. The conclusions reached by the learned arbitrator B are mixed conclusions of fact and law which cannot properly be reviewed in an attempt to set aside the award. If the applicant was not confident in the arbitrator's ability to decide on the issues of law, it could have requested the arbitrator to find the facts and state the issues of law for the decision of the High Court pursuant to s 22 of the Act. Since this has not been done, the applicant cannot therefore ask the court to review the same (see C *Nippon Yusen Kaisha v Acme Shipping Corp* [1972] 1 WLR 74). In the circumstances, I hold that there was no misconduct on the part of the learned arbitrator. The grounds of misconduct as submitted by the applicant are misconceived. The findings of the arbitrator were in accordance with the law and consistent with the findings of fact which were supported by D evidence. I am satisfied that the award is certain when read with the issues which were referred to him.

In the results, I dismiss the motion with costs.

Application dismissed.

E Reported by Yong Yuan Kea

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